



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

7 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

JUN 06 2011

REPLY TO THE ATTENTION OF:

WN-16J

Bruno Pigott, Assistant Commissioner  
Office of Water Quality  
Indiana Department of Environmental Management  
100 North Senate Avenue  
Mail Code IGCN 1315  
Indianapolis, Indiana 46204-2251

Dear Mr. Pigott:

The U.S. Environmental Protection Agency has reviewed Indiana's statutes and rules to determine if the State has the minimum legal authority needed to administer the National Pollutant Discharge Elimination System (NPDES) program. We conducted this review as part of EPA's Permitting for Environmental Results (PER) initiative, a national partnership with states to strengthen the NPDES program. Under PER, EPA reviews the integrity of state NPDES programs and works together with states to make improvements as needed.

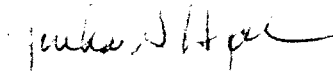
EPA approved Indiana's NPDES program in 1975. Under the approved program, the State has the authority to issue and enforce NPDES permits, including for discharges from federal facilities. The Indiana Department of Environmental Management (IDEM) issues NPDES individual permits and the Indiana Water Pollution Control Board (the Board) issues general permits. EPA approved Indiana's general permits program in 1991.

During the review of Indiana's NPDES legal authorities, EPA coordinated closely with your staff to understand the State's authority and identify and resolve questions. We thank you and your staff for the time and effort spent during this process. By letter dated March 9, 2010, we alerted IDEM to our concerns with two issues: a conflict of interest created by the Board's authorizing statute, as amended in 1998, and the lack of an expiration date in Indiana's general permit rules. IDEM responded in an April 8, 2010, letter, providing a plan to move the general permit program from the Board to IDEM. We appreciate that IDEM is acting to address those issues.

The enclosure to this letter identifies additional concerns with or questions about Indiana's authority. In a reply letter, please provide information to clarify the State's authority on the topics identified in the enclosure or describe the State's plan for establishing the needed authority. Please note that EPA will separately follow up on a December 17, 2009, petition submitted by the Environmental Law and Policy Center, the Sierra Club, and the Hoosier Environmental Council.

Again, thank you for cooperating with EPA to review Indiana's NPDES authority. Please contact me if you have any questions, or you may contact Steve Jann at (312) 886-2446 or Maria Gonzalez, Office of Regional Counsel, at (312) 886-6630.

Sincerely,

A handwritten signature in black ink, appearing to read "Tinka G. Hyde", with a stylized flourish at the end.

Tinka G. Hyde  
Director, Water Division

Enclosure

cc: Paul Higginbotham, IDEM  
Nancy King, IDEM

## Enclosure<sup>1</sup>

1. EPA wants to make sure that the State's NPDES program covers discharges into all navigable waters within the State. Indiana's definition of waters at Ind. Code §13-11-265 had excluded certain bodies of water and limited IDEMs authority over certain wetlands covered by Ind. Code § 13-18-22-10 (referred to as "exempt" wetlands). In 2004, Indiana amended these provisions to include all waters of the United States as defined in section 502(7) of the Clean Water Act (CWA), 33 U.S.C. § 1362(7), in the definition of "waters" at 13-11-2-265(c); and add subsection (b) to Indiana Code 13-18-22-10 to specify, among other things, that the department has authority over wetland activities in an isolated wetland that are subject to the provisions of an NPDES permit. Under the Clean Water Act, waters themselves must be jurisdictional. EPA requests that IDEM obtain a statement from the Office of the Indiana Attorney General clarifying Indiana's law as amended and providing an interpretation regarding the definition of waters of the State and how this definition allows Indiana to address discharges into all waters of the United States as defined by Section 502(7) of the CWA and 40 C.F.R. § 122.2.

2. Ind. Code §13-14-8-8 states that, except as provided in Ind. Code §13-14-8-9 (regarding water quality standard variances), if a person affected by a rule believes the imposition of the rule would impose undue hardship or burden upon the person, they may apply to the Commissioner for a variance from the rule. This provision does not have a federal counterpart. It appears to allow variances that may conflict with the federal NPDES program. Please provide any administrative rules which implement Ind. Code §13-14-8-8 or indicate that the statutory provision is implemented without rules. In addition, please provide a statement from the Office of the Indiana Attorney General indicating whether and how Ind. Code §13-14-8-8 and any implementation rules allow or compel the State to deny a variance under Ind. Code §13-14-8-9 when granting the requested variance would not be as stringent as the federal requirements.

3. Ind. Admin. Code tit. 327, r. 5-2-3 identifies the required content of permit applications. It incorporates a variety of EPA application forms by reference. Except for EPA Forms 2A and 2F, which Indiana incorporates without regard to the EPA publication date, the forms incorporated into Ind. Admin. Code tit. 327, r. 5-2-3, are those in existence in 1986. EPA has revised the federal permit application requirements at 40 C.F.R. § 122.21 about 22 times since 1986. While Ind. Admin. Code tit. 327, r. 5-2-1.5, incorporates into article 5 federal regulations that were in effect as of July 1, 2004, the precise incorporations in Ind. Admin. Code tit. 327, r. 5-2-3, appear to govern rather than the general incorporation in Ind. Admin. Code tit. 327, r. 5-2-1.5. Indiana needs to revise Ind. Admin. Code tit. 327, r. 5-2-3, to incorporate 40 C.F.R. § 122.21 (2010).

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<sup>1</sup> EPA's legal authority review considered changes to Indiana's governing statute and regulations generally through 2005. Subsequent changes to Indiana's NPDES legal authorities need to be submitted to EPA for possible program revision under 40 CFR § 123.62. Changes not submitted and approved by EPA are not considered to be a part of the approved NPDES program.

4. 40 C.F.R. § 122.41 provides that all NPDES permits shall include the following condition:

*(h) Duty to provide information.* The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with this permit. The permittee shall also furnish to the Director upon request, copies of records required to be kept by this permit.

While Ind. Admin. Code tit. 327, r. 5-2-8(4)(B), provides for the submission of information that the permittee knows or has reason to know would constitute cause for modification or revocation and reissuance of a permit, this section does not contain the broad requirement that the permittee comply with the Director's requests for information. Please: (1) identify any separate authority whereby the Commissioner and/or Board may require a permittee to supply the information noted in 40 C.F.R. § 122.41(h) and (2) confirm that Indiana incorporates 40 C.F.R. § 122.41(h) as a condition in each NPDES permit it issues.

5. 40 C.F.R. § 122.42(b)(2) provides that permits issued to publicly-owned treatment works (POTWs) must require the permittee to notify the Director when there is a substantial change in the volume or character of pollutants being introduced into the POTW by a source introducing pollutants into the POTW at the time of permit issuance. Ind. Admin. Code tit. 327, r. 5-2-10(D)(2), requires such notice but only when the change renders the source subject to pretreatment standards or results in a modification to such standards. Please: (1) identify any separate authority whereby a POTW is required to notify the Commissioner in the circumstance identified in the federal regulation or (2) confirm that IDEM incorporates 40 C.F.R. § 122.42(b)(2) as a condition in each NPDES permit it issues to POTWs.

6. Ind. Admin. Code tit. 327, r. 5-2-1.5(3) incorporates by reference the edition of 40 C.F.R. parts 400 to 699 in effect on July 1, 2004. These federal regulations contain effluent limitations guidelines (ELG), new source performance standards (NSPS), and pretreatment standards promulgated under sections 301, 304, 307(a) and 306 of the CWA. Separately, Ind. Admin. Code tit. 327, r. 5-5-1 and 5-5-2 require that NPDES permits ensure compliance with federal requirements including, but not limited to, effluent limits and standards under the CWA sections 301, 304 and 306. Indiana adopted Ind. Admin. Code tit. 327, r. 5-5-1 and 5-5-2, on January 10, 2001. Indiana needs to update article 5 to incorporate the 2010 edition of 40 C.F.R. parts 400 to 699.

7. Ind. Admin. Code tit. 327, r. 5-2-11.5(f) applies to water quality-based effluent limitations that are less than the analytical limit of quantitation (LOQ). Subparagraph (1)(A) of the rule provides that a permit shall include conditions stating that effluent concentrations less than the LOQ are in compliance with the effluent limitation. Does this rule allow Indiana to establish a permit violation when (1) an effluent limitation is expressed as an average, (2) more than one sample is collected during an averaging

period, (3) the analytical results include quantified and unquantified measurements, and (4) the average exceeds the effluent limitation?

8. 40 C.F.R. § 122.45(g) and Ind. Admin. Code tit. 327, r. 5-2-11(f) pertain to pollutants in intake water. On review, EPA found that the Indiana rule does not contain a provision which is consistent with 40 C.F.R. § 122.45(g)(5), providing that intake credits are not available for discharges of raw water clarifier sludge generated from the treatment of intake water. Indiana should add such a provision to its rule or identify other authority under which it will deny an intake credit in the noted circumstance.

The federal and Indiana rules allow credits (called net/gross limits in the federal regulation) where the intake water is from a water body other than the receiving water. *See* 40 C.F.R. § 122.45(g)(4) and Ind. Admin. Code tit. 327, r. 5-2-11(f)(1)(B)(ii). The federal allowance is conditioned on the Director finding that no environmental degradation will result. The Indiana allowance is limited to circumstances where the ambient concentration of pollutants in the source water is not greater than the upstream ambient concentration in the receiving water. The Indiana regulations also limit the credit to situations where the pollutants in the intake water do not vary significantly in physical, chemical, or biological nature from the pollutants limited by the permit nor are they concentrated by the discharger to such a degree that their discharge would significantly degrade the quality of the receiving body of water. Please identify the authority under which IDEM will deny an intake credit that would result in simple environmental degradation or explain how "significantly degrade" in the Indiana rule will protect against any environmental degradation.

The federal rule allows credit only to the extent necessary. *See* 40 C.F.R. § 122.45(g)(3). Ind. Admin. Code tit. 327, r. 4.5-2-11(f) does not appear to contain this limitation. Please identify how IDEM's authority to provide intake credits is limited to the extent of credit that is necessary.

9. Ind. Admin. Code tit. 327, r. 5-2-11(c)(1) provides, consistent with 40 C.F.R. § 122.45(b)(2)(ii), that the Commissioner may include a condition establishing alternate permit limitations, standards, or prohibitions based upon anticipated increases (not to exceed maximum production capacity) or decreases in production levels. The Indiana rule does not specify that permits which include such limitations, standards, or prohibitions will include conditions to implement 40 C.F.R. § 122.45(b)(2)(ii)(B), however. Please identify the authority under which Indiana includes such conditions in permits.

10. 40 C.F.R. § 125.72(c) provides that an application for renewal of a CWA section 316(a), 33 U.S.C. § 1316(a), alternative thermal limitation shall include only such information as described in paragraphs (a) and (b) of the rule as the Director requests within 60 days after receipt of the permit application. The Indiana analog at Ind. Admin. Code tit. 327, r. 5-7-3(c), provides that the Commissioner must request the noted information not later than one year prior to the date on which the renewal application is due unless the Commissioner can demonstrate good cause for making such a request at a

later date. Does IDEM always request the necessary information not later than one year prior to the date on which the renewal application is due? Please explain how the State's requirement is as stringent as the federal requirement and does not adversely affect the State's ability to timely gather information for CWA section 316(a) decisions.